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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1493

MICHAEL FHAGEN and MIRIAM WINTERS,

Petitioners,

against

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York, and ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENT MILLER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENT MILLER

Questions Presented

1. Whether this case presents a present, live controversy.

2. Whether patients may be admitted to mental hospitals on doctors' certificates for a limited period of time and given the opportunity to request a judicial hearing after admission.

3. Whether providing a full-scale hearing on hospitalization only after request of the patient or someone acting in his behalf exacts an unconstitutional waiver of the right to a hearing and counsel.

4. Whether the exploration of so-called "less drastic alternatives" is constitutionally mandated prior to involuntary admission to a mental hospital.

Statement of the Case

Petitioners are both former patients at facilities run by respondents. Mr. Fhagen was last discharged in June, 1969.* Miss Winters was discharged in July, 1968.** It is not asserted that either has been hospitalized since then. Alleging themselves to be in "constant apprehension" of further hospitalization, petitioners sought declaratory and injunctive relief in the New York State courts against the continued operation of New York Mental Hygiene Law, §§ 72 and 78 providing for involuntary and emergency admissions to mental hospitals.*** Both sections were found

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* Mr. Fhagen was previously hospitalized in 1962 for 3 months, in 1964 and in 1967 for six months. His 1969 hospitalization was for under two months. All admissions were the result of acts of violence by petitioner.

** Miss Winters was hospitalized for 2½ months; during the last month of that period and until her discharge she was a voluntary patient. She was admitted for reasons sharply at variance with the facts set forth in the petition (p. 4).

*** An action originally was instituted in the United States District Court for the Southern District of New York alleging the same "apprehension" and requesting the same relief. Finding that there was a real controversy and that substantial question were presented, the single district judge ordered the convening of a three-judge district court. *Fhagen* v. *Miller*, 306 F. Supp. 634 (S.D.N.Y. 1969). That Court abstained from a decision on the merits (69 Civ. 3218 [S.D.N.Y. 1970]) and the State proceeding followed. On March 21, 1972, the complaint was dismissed on the authority of *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411.

by the state courts to be constitutional. *Fhagen* v. *Miller*, 65 Misc. 2d 163, 317 N.Y.S. 2d 128 (Sup. Ct. N.Y. Co. 1970), *modified and affirmed* 36 A.D. 2d 926, 321 N.Y.S. 2d 61 (1st Dept. 1971), affirmed 29 N.Y. 2d 348, 328 N.Y.S. 2d 393 (1972).

Mental Hygiene Law, § 78, as modified by regulation (14 N.Y.C.R.R. § 62.2), provides that certain facilities may receive persons "alleged to be in need of immediate observation, care or treatment for mental illness" and may retain such patients for no more than 15 days. This period may be shortened by notice by the patient or someone on his behalf of the desire to leave in which case the hospital must, if it feels retention is necessary, file papers pursuant to Mental Hygiene Law, § 72, authorizing retention for an additional 60 days. A Section 78 patient must, on admission, be notified in writing that he has the right to demand his release at any time and, if not released, to receive a judicial hearing and that the Mental Health Information Service has been told of his admission and is available to him. A demand for release which the hospital is unwilling to meet is to be treated as a request for habeas corpus pursuant to N.Y. Mental Hygiene Law, § 426 and the appropriate court and the Mental Health Information Service are to be notified. This proceeding does not abrogate the obligation of the hospital to file a two-physician certificate as required by Mental Hygiene Law, § 78(2).

Under Mental Hygiene Law, § 72 the director of a hospital may receive and retain as a patient any person alleged to be mentally ill and suitable for care and treatment on the certificate of two examining physicians, accompanied by an application for the admission of such persons executed no more than ten days earlier by one of certain specified people. On admission, the patient must be examined forthwith by a staff physician and, within five days of his admission, he must be given notice of his right to demand a judicial hearing on the question of his need for further hospitalization. Notice must also be given to the

patient's relatives or friends and to the Mental Health Information Service, each of whom may demand a hearing. After the hearing the Court may order the patient retained in the hospital for a period not to exceed six months, may transfer care and custody of the patient to his relatives or a committee, or may release the patient.

If no demand for a hearing is made within the first sixty days, any longer retention may be had only on application by the director for a court order of retention. A hearing may be had on demand. If no hearing is requested, the Court may, if satisfied that retention is necessary, issue an order authorizing retention for up to six months. Thereafter, similar orders must be sought after a year and after each subsequent two years (N.Y. Mental Hygiene Law, § 73). Any order of retention may be reviewed before another judge and a jury (N.Y. Mental Hygiene Law, § 74).

The Mental Health Information Service was established in 1964 with offices in each of the judicial departments of the State. It is responsible for studying and reviewing the admission and retention of patients, informing those patients and others interested in their welfare about admission and retention procedures and of the rights to hearings and review, to counsel and to independent medical opinion. The Service may demand hearings; it may represent patients. It must inform the Court of the relevant material during any pending proceeding (N.Y. Mental Hygiene Law, § 88).

In the New York Court of Appeals, petitioners claimed that:

1. Mental Hygiene Law, § 78 could not constitutionally mean that persons not dangerous to themselves or others could be summarily hospitalized without prior notice or hearing;

2. Mental Hygiene Law, § 72 is unconstitutional because it does not require that patients be danger-

ous to themselves or others or lack the ability to decide for themselves whether or not they should be hospitalized;

3. Mental Hygiene Law, §§ 72 and 78 are unconstitutional because they presume a "waiver" of the right to a hearing and counsel;

4. The need for hospitalization must be proved beyond a reasonable doubt; and

5. Due process requires that hospitalization may not be ordered where "less drastic alternatives would suffice."

In a unanimous opinion by Chief Judge Fuld the Court rejected these contentions and found the challenged statutes to establish reasonable standards and ample procedural safeguards.

Subsequent to the decision below, the New York State Legislature enacted a new Mental Hygiene Law which will become effective on January 1, 1973. As relevant to the issues before this Court, the new law (§ 31.39) provides that a hospital may admit on an emergency basis:

> "any person alleged to have a mental illness for which immediate observation, care and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or others. 'Likelihood to result in serious harm, as used in this article shall mean:
>
> (1) substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself, or
>
> (2) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm."

A complete copy of this section is annexed hereto as Appendix "A".

The new medical admission sections (§ 31.27) preserve the principle of Section 72. A complete copy of these sections are annexed hereto as Appendix "B". One significant addition is § 31.27(d) which provides:

> "Before an examining physician completes the certificate of examination of a person for involuntary care and treatment, he shall consider alternative forms of care and treatment that might be adequate to provide for the person's needs without requiring involuntary hospitalization. If the examining physician knows that the person he is examining for involuntary care and treatment has been under prior treatment, he shall, insofar as possible, consult with the physician or psychologist furnishing such prior treatment prior to completing his certificate. Nothing in this section shall prohibit or invalidate any involuntary admission made in accordance with the provisions of this chapter."

REASONS FOR DENYING CERTIORARI

I

Since neither petitioner is in a mental hospital there is no justiciable controversy between the parties.

Respondents asserted in the federal action that petitioners did not set forth a case or controversy because neither was in a hospital.* The argument was not raised in the state courts although at least one court seemed very dubious that the allegation of "constant apprehension" was sufficient to confer standing (Pet. p. 27). Now that petitioners once more seek relief from a court bound by

* Petitioner Winters was not a plaintiff in the federal action. Her motion to intervene in that case was not decided. At the time she made the motion, she was not a patient.

Article III of the United States Constitution it must again be pointed out that petitioners are not now hospitalized; they have not been hospitalized for three and four years respectively; they have never claimed that their mental health is such that there is any immediate (or remote) possibility of their being involuntarily placed in such a hospital. Accordingly, there is no "substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Gas Co.* v. *Pacific Coal and Oil Co.*, 312 U.S. 270, 273. See also, *Lake Carriers' Assn.* v. *MacMullan*, —— U.S. ——, 40 U.S. L. Week 4569 (May 30, 1972); *Golden* v. *Zwickler*, 394 U.S. 103, 110.

Previous hospitalization does not create a presumption that petitioners will deteriorate to a degree requiring future hospitalization. Petitioners do not suggest it. Moreover, on January 1, 1973 the new Mental Hygiene Law will go into effect. After that date emergency admission, the only kind under which petitioners have ever been initially hospitalized will be governed by the very danger standard for which they argue. Accordingly, the possibility of their future hospitalization becomes even more speculative than it was below.

II

The decision below was correct and consistent with decisions of this Court.

A. The New York Statutes Exact No Waiver At All From Patients.

Petitioners describe the failure to request a hearing as a presumed waiver of rights and the right to a hearing itself as a "sham" (Pet. pp. 6-7). They cite out-of-context statistics and inapposite cases to fashion a constitutional claim which is legally incorrect and medically unsound. The argument is merely another way of stating the claim that no one should be hospitalized without a

hearing (B. *infra*). The theory totally misconceives the nature of waiver. A waiver refers to the future irreversible consequences of a failure to act. However, failure to request a judicial hearing in no way precludes any subsequent request for a hearing and is not a waiver of the right to review. Because at least with the substantial safeguards provided in New York, a pre-admission hearing is not mandated, labelling the failure to request such a hearing an impermissible waiver adds nothing to the argument.

Petitioners deduce from selected statistics that many more people would be released if hearings were mandatory. In fact, since 1964, when sweeping changes were made in the Mental Hygiene Law, the turnover rate at state hospitals has increased sharply and the average stay of new patients in such hospitals is 45 days. Obviously, there is a more efficient process occurring than a multistep formal judicial process. It is just as easy to surmise that such procedures are not necessary as it is to bemoan their absence. And, notwithstanding petitioners' attempts to downgrade its value (Pet. p. 5, n. 3), it is clear that one of the important factors in this process is the Mental Health Information Service. Indeed, in *Thorn* v. *Superior Court,* 83 Cal. Rep. 600, 464 P. 2d 56 (1970) cited by petitioners, the Court directed participation by counsel in a manner analogous to the services provided by the Mental Health Information Service. And, in *Anderson* v. *Solomon,* 315 F. Supp. 1192 (D. Md. 1970), also cited by petitioners (p. 12, n. 12), the Court indicated that its result would have been different had Maryland had an agency like the Mental Health Information Service. Such an agency has recently been established in Maryland.

Review which is desired is easily obtained. The patient need not have the initiative to request it himself. Anyone may do it for him. Even if no one requests it, a Court must periodically review the record, on notice to the patient, his relative or friends and the Mental Health Information Service.

B. Direct Admission To A Mental Hospital Does Not Contravene Due Process of Law.

Both petitioners were initially admitted to Bellevue Hospital under § 78 of the Mental Hygiene Law, the emergency admission section. Obviously, their admission under that provision did not require a prior hearing, especially in light of the procedural safeguards afforded. Both petitioners were subsequently converted to § 72 status. They claim that such hospitalization was a denial of due process of law and label what in reality is medical admission as "summary" admission. However, once a person is already a patient, it is of no constitutional significance that he is given a new status and then a hearing rather than the reverse. In any event, he is still in the hospital and will have had the opportunity to test the necessity for his admission. Accordingly, neither petitioner has a basis to challenge the law.

The present provisions of the Mental Hygiene Law are the result of an extensive investigation prompted by growing understanding of the nature of mental illness and by increasingly sophisticated methods of treatment. The revisions sought, among other things, to move away from judicial and toward medical admission to mental hospitals both in order to remove the stigma and trauma of incarceration so frequently attached to hospitalization for mental illness, and to provide swift admission, treatment and discharge. The changes, which in substance follow the recommendations of a distinguished panel of doctors, lawyers, judges and teachers, were made with careful attention to the requirements of due process of law and, indeed, were designed to provide more meaningful judicial review than was available under prior law. See MENTAL ILLNESS AND DUE PROCESS: REPORT AND RECOMMENDATIONS ON ADMISSION TO MENTAL HOSPITALS UNDER NEW YORK LAW BY THE SPECIAL COMMITTEE TO STUDY COMMITMENT PROCEDURES OF THE ASSOCIATION OF THE BAR

OF THE CITY OF NEW YORK IN COOPERATION WITH THE CORNELL LAW SCHOOL (1962) (hereinafter MENTAL ILLNESS AND DUE PROCESS). Most of the relief sought by petitioners would return New York to a form of admission to mental hospitals found by the Legislature to be totally unsatisfactory.

In fact, the New York statutory scheme for involuntary hospitalization of the mentally ill is unimpeachable. The direct admission procedure is merely one aspect of that scheme, and must be considered along with the fact that admission is for a limited time and is accompanied by the prompt involvement of a court-connected agency, the Mental Health Information Service, and the opportunity for a hearing. *Matter of Coates,* 9 N.Y. 2d 242, 250, 254 *app. dism. for want of a substantial federal question* 368 U.S. 34. *Coates,* indeed, is dispositive of this case. Even if no hearing is requested the patient cannot be retained beyond 60 days without a court order. As thus constituted, the New York law is entirely consistent with due process, taking proper account of the unique status of the mental patient both from a medical and judicial point of view. Indeed, the New York procedure implements the holding of this Court that to treat a person who is mentally ill as though he were a criminal, to "try" and "convict" him for his illness, would be cruel and unusual punishment. *Robinson* v. *California,* 370 U.S. 600, 666.

C. The Exploration Of "Less Drastic" Alternatives To Full-Time Hospitalization Is Not A Constitutional Requirement.

Petitioners contend that the present New York policy (soon to be a statutory requirement) of exploring alternatives to hospitalization is a constitutional rule. It is not. The requirement for exploring alternative methods for achieving a valid purpose is a direct outgrowth of the "overbreadth" principle applicable in First Amendment

cases. That is, where the inquiry is whether or not a policy abridges a virtually unconditional right, such as free speech (*Shelton* v. *Tucker,* 364 U. S. 479) marital privacy (*Griswold* v. *Connecticut,* 381 U. S. 479) or the right to travel (*Shapiro* v. *Thompson,* 394 U. S. 618), the policy must not only represent a compelling state interest but it must not overstep the bounds represented by the compelling interest. However, "[i]n other areas involving different constitutional issues, more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional central purpose." *Shelton* v. *Tucker, supra* at 488 n. 8.

Accordingly, the District of Columbia Circuit, which initially announced its requirement of such exploration in statutory terms (*Lake* v. *Cameron,* 364 F. 2d 657 [D. C. Cir. 1966]), has been overhasty in transforming this requirement into a constitutional rule. *Covington* v. *Harris,* 419 F. 2d 617 (D. C. Cir. 1969).

Moreover the point is not justiciable since there is no expressed intention to do other than explore such alternatives. Certainly, New York is beginning to establish facilities for care other than full-time hospitalization, but these facilities are not equal to the need for them. This is an area which can only be dealt with as facilities become available and no Constitutional rule can make them available. *Jefferson* v. *Hackney,* —— U.S. —— (May 30, 1972); *Dandridge* v. *Williams,* 397 U.S. 471, 487. The only thing the announcement of policy as a constitutional rule would achieve would be to foment endless litigation over the available facilities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y., June 23, 1972.

Respectfully submitted,

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Appendix A.

§ 31.39 Emergency admissions for immediate observation, care, and treatment.

(a) The director of any hospital maintaining adequate staff and facilities for the observation, examination, care, and treatment of persons alleged to be mentally ill and approved by the commissioner to receive and retain patients pursuant to this section may receive and retain therein as a patient for a period of fifteen days any person alleged to have a mental illness for which immediate observation, care, and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or others. "Likelihood to result in serious harm" as used in this article shall mean:

(1) substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself, or

(2) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.

The director shall cause to be entered upon the hospital records the name of the person or persons, if any, who have brought such person to the hospital and the details of the circumstances leading to the hospitalization of such person.

The director shall admit such person pursuant to the provisions of this section only if a staff physician of the hospital upon examination of such person finds that such person qualifies under the requirements of this section. Such person shall not be retained for a period of more than forty-eight hours unless within such period such finding is confirmed after examination by another physician who shall be a member of the psychiatric staff of the hos-

pital. Such person shall be served, at the time of admission, with written notice of his status and rights as a patient under this section. Such notice shall contain the patient's name. At the same time, such notice shall also be given to the mental health information service and personally or by mail to such person or persons, not to exceed three in number, as may be designated in writing to receive such notice by the person alleged to be mentally ill. If at any time after admission, the patient, any relative, friend, or the mental health information service gives notice to the director in writing of request for court hearing on the question of need for immediate observation, care, and treatment, a hearing shall be held as herein provided as soon as practicable but in any event not more than five days after such request is received, except that the commencement of such hearing may be adjourned at the request of the patient. It shall be the duty of the director upon receiving notice of such request for hearing to forward forthwith a copy of such notice with a record of the patient to the supreme court or county court in the county where such hospital is located. A copy of such notice and record shall also be giver the mental health information service. The court which receives such notice shall fix the date of such hearing and cause the patient or other person requesting the hearing, the director, the mental health information service and such other persons as the court may determine to be advised of such date. Upon such date, or upon such other date to which the proceeding may be adjourned, the court shall hear testimony and examine the person alleged to be mentally ill, if it be deemed advisable in or out of court, and shall render a decision in writing that there is reasonable cause to believe that the patient has a mental illness for which immediate inpatient care and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or others. If it

be determined that there is such reasonable cause, the court shall forthwith issue an order authorizing the retention of such patient for any such purpose or purposes in the hospital for a period not to exceed fifteen days from the date of admission. Any such order entered by the court shall not be deemed to be an adjudication that the patient is mentally ill, but only a determination that there is reasonable cause to retain the patient for the purposes of this section.

(b) Within fifteen days of arrival at the hospital, if a determination is made that the person is not in need of involuntary care and treatment, he shall be discharged unless he agrees to remain as a voluntary or informal patient. If he is in need of involuntary care and treatment and does not agree to remain as a voluntary or informal patient, he may be retained beyond such fifteen day period only by admission to such hospital or another appropriate hospital pursuant to the provisions governing involuntary admission, on application supported by medical certification and subject to the provisions for notice, hearing, review, and judicial approval of retention or transfer and retention governing such admissions, provided that, for the purposes of such provisions, the date of admission of the patient shall be deemed to be the date when the patient was first received under this section. If a hearing has been requested pursuant to the provisions of subdivision (a), the filing of an application for involuntary admission on medical certification shall not delay or prevent the holding of the hearing.

Appendix B.

§ 31.27 Involuntary admission on medical certification.

(a) The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission of such person. The examination may be conducted jointly but each examining physician shall execute a separate certificate.

(b) Such application must have been executed within ten days prior to such admission. It may be executed by any one of the following:

1. any person with whom the person alleged to be mentally ill resides.
2. the father or mother, husband or wife, brother or sister, or the child of any such person or the nearest available relative.
3. the committee of such person.
4. an officer of any well recognized charitable institution or agency or home in whose institution the person alleged to be mentally ill resides.
5. the director of community services or social services official, as defined in the social service law, of the city or county in which any such person may be.
6. the director of the hospital in which the patient is hospitalized.

(c) Such application shall contain a statement of the facts upon which the allegation of mental illness and need for care and treatment are based and shall be executed under penalty of perjury but shall not require the signature of a notary public thereon.

(d) Before an examining physician completes the certificate of examination of a person for involuntary care and treatment, he shall consider alternative forms of care and treatment that might be adequate to provide for the person's needs without requiring involuntary hospitalization. If the examining physician knows that the person he is examining for involuntary care and treatment has been under prior treatment, he shall, insofar as possible, consult with the physician or psychologist furnishing such prior treatment prior to completing his certificate. Nothing in this section shall prohibit or invalidate any involuntary admission made in accordance with the provisions of this chapter.

(e) The director of the hospital where such person is brought shall cause such person to be examined forthwith by a physician who shall be a member of the psychiatric staff of such hospital other than the original examining physicians whose certificate or certificates accompanied the application and, if such person is found to be in need of involuntary care and treatment, he may be admitted thereto as a patient as herein provided.

(f) Following admission to a hospital, no patient may be sent to another hospital by any form of involuntary admission unless the mental health information service has been given notice thereof.